LEE MAN CONSTRUCTION COMPANY SDN BHD

v.

GUNASUNTHARI PALANIAPPAN (DAN PENGHUNI-PENGHUNI LAIN YANG TIDAK DIKENALI)

HIGH COURT MALAYA, SHAH ALAM
ALIZATUL KHAIR OSMAN JC
[ORIGINATING SUMMONS NO: 24-228-2003]
27 AUGUST 2004

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Application for recovery of possession of land - Existing court action in respect of same matter - Whether res judicata - Whether facts and issue different - Whether an abuse of process of court*

LAND LAW: *Trespass - Unlawful occupation - Defendants occupying premises despite termination of sale and purchase agreement between defendants and plaintiff - Defendants' sued plaintiff in earlier writ action - Whether defendants entitled to stay on premises pending disposal of writ action*

CIVIL PROCEDURE: *Summary judgment - Summary possession of land, application for - Whether there were triable issues - Whether summary judgment ought to be granted - Rules of the High Court 1980, O. 89*

This was an application by the plaintiff under O. 89 of the Rules of the High Court 1980 ('the RHC') for the recovery of possession of a low cost flat ('the said premises') from the defendants, who were allegedly occupying the said premises without the plaintiff's consent or agreement. The plaintiff, the owner and developer of the land upon which the said premises was built, had entered into a sale and purchase agreement with the defendants, who had wished to purchase the said premises. The plaintiff, however, terminated the agreement resulting in the defendants sueing the plaintiff for specific performance and unlawful termination of the sale and purchase agreement *vide* MT4-22-146-00 in the Shah Alam High Court ('the writ action').

The defendants broke into and occupied the said premises; the plaintiff subsequently issued a notice to quit to the defendants and even agreed to allow the defendants to continue occupying the said premises until the end of January 2003. Since the defendants failed to vacate the said premises by the end of January 2003 despite repeated requests by the plaintiff, the plaintiff filed the present proceedings. The defendants raised a preliminary objection, contending that the present originating summons proceedings should be dismissed on the ground of *res judicata* as there was an existing court action in respect of the

same matter *ie*, the writ action. The defendants, although not disputing that the plaintiff was the registered owner of the said premises, also averred that the plaintiff could not ask for recovery of possession of the said premises as the defendants were entitled to occupy the said premises pending the disposal of the writ action as they had paid 85% of the purchase price.

Held (allowing the application):

[1] Even though s. 25(2) of the Courts of Judicature 1964 read together with para. 11 of the Schedule to the same Act confers on the court the power to dismiss or stay proceedings where the matter in question is *res judicata*, there was no question of *res judicata* here since the writ action had yet to be decided. Furthermore, since the proceedings here were based on the trespass and forcible entry of the defendants into the said premises, whereas the writ action was based on the alleged wrongful termination of the sale and purchase agreement between the plaintiff and the defendants, the facts and issue giving rise to the present proceedings were, in that sense, different from that of the writ action, and there was no abuse of the process of the court. Thus, the defendants' preliminary objection ought to be dismissed. (pp 170 i & 171 a-b)

[2] In the present case, it was abundantly clear from the facts of the case as adduced in the plaintiff's affidavit in support (and in the absence of any affidavit to the contrary by the defendants) that the plaintiff was the registered owner of the said premises and the defendants were trespassers. The defendant's contention that the defendants were entitled to stay on the premises pending the disposal of the writ action was unacceptable and contrary to public policy itself. Until and unless the court decided otherwise, the termination of the sale and purchase agreement by the plaintiff was deemed to be a lawful termination, and the entry and continued occupation of the premises by the defendants after the termination date *ie*, after the expiry of the notice to quit, constituted an act of trespass. (p 173 f-h)

[3] Even if the court were to take judicial notice of the writ action and the claim thereunder, the existence of such a claim did not constitute a triable issue for the purpose of this application. Nor did the issue of fraud purportedly raised by the defendants in that writ action. Those issues may be relevant for the writ action but not for an application under O. 89 of the RHC, where the issues to be considered were whether the plaintiff was a registered proprietor of the said premises (to which the defendant had already conceded) and whether the defendants were trespassers, which had been clearly established in this case. Hence, there were no triable issues in this case and summary judgment under this order ought to be granted to the plaintiff. (p 174 b-d)

Case(s) referred to:

Chin Wing Wa & Ors v. Ong Beng Chong [1994] 1 AMR 41 ***(refd)***

Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(dist)***

Penghuni-Penghuni Premis Tersebut v. Eugene AF Decruz & Anor [1998] 2 CLJ 123 CA ***(refd)***

Selayang Raya Development Sdn Bhd v. 123 Orang Yang Disenaraikan Dalam Lampiran 'A' Dan Semua Orang Lain Yang Tidak Dikenali Yang Menduduki Dalam 130 Bangunan Atas Tanah Yang Dibawah HS(M) 20996 PT No 34799 Mukim Batu Daerah Gombak (Tempat Batu 8, Jalan Rawang) [2001] 7 CLJ 624 HC ***(refd)***

Superintendent of Pudu Prison & Ors v. Sim Kie Choon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(dist)***

Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek [1994] 1 CLJ 547 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)
Federal Constitution, art. 8(1), 42(1)
Rules of the High Court 1980, O. 14, O. 89

For the plaintiff - KB Tan; M/s KB Tan, Kumar & Partners
For the defendant - V Nair (CV Lim); M/s Paul Cheah & Assoc

Reported by Suresh Nathan

JUDGMENT

Alizatul Khair Osman JC:

By way of originating summons, (encl. 1) plaintiff applied, under O. 89 of the Rules of the High Court (RHC) for the following orders, namely:

1) Plaintif hendaklah mendapatkan balik milikan rumah pangsa kos rendah CG-21, Blok C, Taman Seri Berembang, yang dipegang dibawah Geran Besar No HS(D) 13521, No. PT 190, Mukim Pelabuhan Kelang Seksyen 4, Daerah Kelang, Selangor atas alasan bahawa Plaintif berhak mendapat milikan itu dan bahawa orang yang menduduki itu telah menduduki tanpa kebenaran atau persetujuan.

2) Pihak berkuasa berkenaan khasnya Majlis Perbandaran Pelabuhan Kelang dan polis memberi bantuan kepada Plaintif, sekiranya bantuannya adalah diperlukan untuk melaksanakan perintah (1) diatas;

3) Kos untuk tindakan ini dan

4) Relief-relief yang Mahkamah Mulia ini anggap sesuai dan manfaat.

In essence plaintiff is claiming recovery of possession of the abovesaid 'rumah pangsa kos rendah' or low cost flat (the said premises) from the defendants who are allegedly occupying the said premises without the plaintiff's consent or agreement.

Background Facts

The brief facts as outlined in the affidavit in support of the plaintiff's application (encl. 2) are as follows:

The plaintiff is the land owner and developer of land held under Geran Besar No: HS(b) 13521, No. PT 190, Mukim Pelabuhan Kelang, Seksyen 4, Daerah Klang, Selangor on which is built the said premises. The defendant had entered into a sale and purchase agreement with the plaintiff for the purchase of the said premises on 25 November 1997. However the said sale and purchase agreement was terminated by the plaintiff on 28 July 1998 on the alleged ground of 'salah nyata' (misrepresentation or fraudulent misrepresentation). The letter of termination containing the abovesaid allegations is found at exh. 'YKK2' of encl. (2). Pursuant to the purported termination, defendant then sued the plaintiff *vide* MT4-22-146-00 in the Shah Alam High Court (the writ action). Sometime in October 2002, plaintiff was informed by its workers that the defendant had broken into and occupied the said premises. A police report was lodged by the plaintiff on 14 October 2002 in respect of defendant's action (exh. YKK3) as the latter has not been granted a license or consent to occupy the said premises.

Plaintiff subsequently issued through its solicitor a notice to quit to the defendant (exh. YKK4). Pursuant to the said notice, defendant saw the plaintiff and pleaded with them to allow her to continue occupying the said premises until the end of January 2003 while she looks for an alternative place to stay. On humanitarian grounds plaintiff agreed to her request and allowed her to continue occupying the said premises until the end of January. However as defendant failed to vacate the said premises by the end of January 2003 despite repeated requests by the plaintiff, plaintiff filed these present proceedings.

Preliminary Objection

When the case came up for hearing before this court on 15 July 2003, counsel for defendant requested for an adjournment in order to file an affidavit in reply. He further stated that if his request is not acceded to then he will raise a preliminary objection (P.O.) on the ground that there is a pending action in this court, *viz* the writ action in which the defendant herein has sued the plaintiff for specific performance and unlawful termination of the sale and purchase agreement which, according to learned counsel is also the subject matter of the present originating summons (OS) proceedings.

Counsel for plaintiff in response answered that the present case was filed pursuant to defendant's action in forcibly entering and occupying the said premises whilst the writ action is still pending. In other words the defendant's conduct as such had given rise to a new cause of action which necessitated the filing of the present OS proceedings. He further objected to counsel's request

for an adjournment as the OS was served on defendant some three months earlier. Counsel for plaintiff initially objected to defendant counsel's appearance in court as the latter had not filed his memorandum of appearance. However this objection was subsequently withdrawn.

As plaintiff's counsel did not agree to the adjournment, court directed counsel for defendant to submit on his P.O.

Defendant's contention is that the present OS proceedings should be dismissed on the ground of *res judicata* as there is an existing court action in respect of the same matter, ie, the writ action. Counsel relied on s. 25(2) of the Courts of Judicature Act 1964 (the Act) and para. 11 of the schedule to the Act. Counsel also referred to the case of *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC in support of this proposition. In that case the respondent, MBBS had filed a claim to recover its loan of RM5 million. Whilst that action was still pending respondent filed an application in another court for foreclosure of the land charged to secure the said loan. The Supreme Court in that case was of the view that "it is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter. In this case the hearing of the foreclosure proceedings should have been postponed until the final disposal of the claim on the debt. The order of sale should be set aside and the hearing of the foreclosure application be dealt after final disposal of the claim on the debt."

Counsel contends that the situation is the same here where the OS raises the same cause of action and is based on the same set of facts as the writ action. The new facts alleged to have arisen after the writ action was filed could have been raised in the latter action. He further alleged that the filing of these OS proceedings would result in a re-ventilation of the same issues and whilst conceding that it would not actually be *res judicata* as the writ action is yet to be adjudicated upon, the filing of these proceedings is nevertheless an abuse of the process of court as its decision would affect the outcome of the writ action. Counsel cited the case of *Superintendent of Pudu Prison & Ors v. Sim Kie Choon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 in further support of his point. Here, the respondent had commenced on action against the first and third appellants and the Pardons Board Malaysia for a declaration impugning the rejection of clemency on the ground of discrimination in breach of art. 8 of the Constitution. The action was struck out when it came up before the High Court and the appeal dismissed by the Supreme Court. The respondent then instituted this suit against the first three appellants for a declaration to the effect that the decision of the Pardons Board was void and legally ineffective and that it had acted unfairly and in breach of the rules of natural justice and

of the provision of arts. 42(1) and 8(1) of the Constitution. In allowing the appeal to set aside the suit for abuse of process of the court, the Supreme Court expressed the following view on *'res judicata'*:

> There is moreover the inherent jurisdiction of the court in cases where *res judicata* is not strictly established, and where estoppel *per rem judicatam* has not been sufficiently pleaded, or made out but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require.

The court then went on to pronounce that:

> The attempt by way of the instant proceedings to relitigate and reopen the earlier action would appear to us to be as clear an instance of an abuse of the process of the court as one can find ...

In reply learned counsel for plaintiff stated that he was unaware that counsel would raise the issue of *res judicata* and as such did not come prepared with authorities on this issue. He however will attempt to distinguish the cases cited. With regard to para. 11 of the second schedule of the Courts of Judicature Act, counsel argued that clearly *res judicata* applied only in situations where the litigants are the same and the issue and facts are the same. In this case, the facts differ from the writ action in that the latter does not contain any statement about the trespass and forcible entry of the defendant into the plaintiff's premises. Defendant has not denied entering plaintiff's premises whilst the writ action is still pending. *Lesco*'s case, according to counsel is different because it is clear from the facts of the case that both the action to recover the loan and foreclosure action arose from the same set of facts, namely breach of the charge instrument by the respondent. The case of *Sim Kie Choon v. Superintendent of Pudu Prison* in his view merely serves as authority on the general principle of *res judicata*. Hence, he applied for the P.O. to be dismissed and defendant's application that OS be stayed pending the trial of the writ action be rejected. In reply, counsel for defendant reiterated that both cases involve the same facts and the same cause of action to the extent that the plaintiff here is claiming for vacant possession on the basis of the termination of the sale and purchase agreement which is the subject matter of the writ action. On that ground counsel applied for the OS to be struck out forthwith with costs or the OS be stayed pending disposal of writ action on alternatively defendant be given leave to file affidavit in reply.

In my view, s. 25(2) of the Courts of Judicature Act 1964 read together with para. 11 of the schedule confers on the court power to dismiss or stay proceedings where the matter in question is *res judicata*. As conceded by learned

counsel for the defendant, there is no question of *res judicata* here as the writ action has yet to be decided upon. On whether these proceedings are an abuse of the process of court since there is a pending writ action involving the same parties and the same set of facts, again my view here is that there is no such abuse. As submitted by counsel for plaintiff, the proceedings here are based on the trespass and forcible entry of the defendant into the said premises, whereas the writ action was based on the alleged wrongful termination of the sale and purchase agreement between the plaintiff and the defendant. Thus the facts and issue giving rise to the present proceedings are in that sense different from that of the writ action. Although para. 11 of the Courts of Judicature Act 1964 empowers the court to dismiss or stay proceedings where the matter in question is *res judicata* between the parties or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued, I am of the opinion that for the reason stated earlier there is no multiplicity of proceedings here to warrant a dismissal or stay of these proceedings. *Lesco*'s case, *supra,* can be distinguished. Clearly both the claim for recovery of money and the foreclosure action gave rise to the same issue, involving the same parties and relating to the same subject matter. *Sim Kie Choon*'s case, *supra* is also not applicable here as it is patently obvious from the facts that *res judicata* applied. Whilst the Supreme Court opined that the court has inherent powers to dismiss or stay proceedings where *res judicata* is not strictly established or the plea of *estoppel rem judicatum* was not sufficiently pleaded, it can only do so "where circumstances are such as to render any reagitation of the questions **formally adjudicated upon a scandal and an abuse**." (emphasis added). This is not the case here since the writ action has yet to be adjudicated upon.

For the above reasons, I dismissed the P.O. with costs and although it would mean giving the defendant "two bites at the cherry" as contended by learned counsel for the plaintiff, in the interest of justice I allowed the defendant's application for extension of time to file an affidavit in reply. I therefore ordered the defendant to file his affidavit in reply within three weeks and for the plaintiff to file an affidavit in reply thereto within two weeks of service of the same.

Main Application

When the case subsequently came up for hearing the court was informed by plaintiff's counsel that the defendant has yet to file his affidavit in reply. This was confirmed by counsel for defendant who in a volte-face decided not to file any affidavit in reply.

In his submission, learned counsel contended that as plaintiff has the title deed he is the registered owner of the said premises and the defendant a trespasser until the latter proves otherwise. Her initial status was that of a mere licensee. The license was terminated when plaintiff issued the notice to quit on 31

October 2002 (YKK4) and henceforth defendant became a trespasser. Plaintiff had allowed defendant to occupy the said premises until end of January 2003 purely on humanitarian grounds to enable defendant to look for alternative occupation. Defendants' continued occupation of the said premises tantamounts therefore to a trespass. Plaintiff cited the cases of *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd Taufek* [1994] 1 CLJ 547, *Selayang Raya Development Sdn. Bhd v. 123 orang yang disenaraikan dalam lampiran 'A' dan semua orang lain yang tidak dikenali yang menduduki dalam 130 bangunan atas tanah yang dibawah HS(M) 20996 PT No 34799 Mukim Batu Daerah Gombak (Tempat Batu 8, Jalan Rawang)* [2001] 7 CLJ 624, and *Penghuni-Penghuni Premis Tersebut v. Eugene a/l AF Decruz & Anor* [1998] 2 CLJ 123, in support of their application. Based on the facts and authorities cited, plaintiff submitted that they had complied with the requirements of O. 89 RHC and prayed for an order in terms of their application.

Learned counsel for the defendant reiterated his earlier arguments and averred that whilst he does not dispute that plaintiff is the registered owner, he nevertheless contended that plaintiff cannot now ask for recovery of possession pending the disposal of the writ action. He went on to assert that defendant is entitled to occupy the said premises pending the disposal of the writ action as the latter had paid 85% of the purchase price (a submission from the Bar as no affidavit to that effect had been filed). When asked by the court for an authority to support his contention that defendant can lawfully occupy the said premises pending disposal of the writ action counsel could not provide any.

Learned counsel for plaintiff retorted that defendant is estopped from raising the same argument as the court had already dismissed the P.O. and there had been no appeal from the said decision. Learned counsel also urged the court to reject defendant's argument that defendant can lawfully occupy the said premises while awaiting disposal of their writ action as this would be contrary to public policy.

Findings

After having considered the arguments advanced by both counsel, I am of the view that plaintiff has fulfilled the requirements of O. 89 of the RHC and therefore granted an order in terms of their application except for prayer (2) which I found to be unnecessary. In prayer (2) of the OS, plaintiff had prayed for an order that:

> Pihak berkuasa berkenaan khasnya Majlis Perbandaran Pelabuhan Kelang dan polis memberi bantuan kepada Plaintiff, sekiranya bantuannya adalah diperlukan untuk melaksanakan perintah (1) diatas;

Order 89 of the RHC provides as follows:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding after the termination of the tenancy) who entered into or remained in occupation without his license or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

The principles governing O. 89 of the RHC are fairly established as illustrated by the cases, *supra*, cited by the plaintiff in support of their application. In the case of *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd. Taufek*, the court held, *inter alia*, that:

> Order 89 applies to situations where persons entered into occupation of land without the licence or consent of the person entitled to possession as well as to situations where persons enter into occupation of land with license from the person entitled to possession ... but subsequently remains in such occupation without the license or consent of the person entitled to possession of the land ...

In the case of *Selayang Raya Development Sdn. Bhd. v. 123 orang yang disenaraikan dalam lampiran 'A', supra*, Low Hop Bing J, quoting Mohd. Azmi SCJ, as he then was in *Chin Wing Wa & Ors v. Ong Beng Chong* [1994] 1 AMR 41 at p. 48, stated, *inter alia*, that the summary procedure under O. 89 is governed by the same principles as those under O. 14. To quote the learned judge, "In other words, the defendant has to show that there is a triable issue or fact."

In the present case, it is abundantly clear from the facts of the case as adduced in the plaintiff's affidavit in support (and in the absence of any affidavit to the contrary by defendant) that the plaintiff is the registered owner of the said premises and the defendant a trespasser. In this regard I find defendant counsel's assertion that defendant is entitled to stay on the premises pending the disposal of the writ action unacceptable. I agree with plaintiff's counsel that such a stand is contrary to public policy if not the law itself. Until and unless the court decides otherwise, the termination of the sale and purchase agreement by the plaintiff is deemed to be a lawful termination and the entry and continued occupation of the premises by the defendant after the termination date (ie, after the expiry of the notice to quit, in this case) would constitute an act of trespass. I would also disagree with learned counsel for defendant's suggestion that an injunction would be a more appropriate remedy rather than an order for vacant possession under O. 89 RHC as I can find nothing in the said order that precluded its application to the present case.

Learned counsel for defendant tried to argue that this is not a proper case for summary procedure as defendant is alleging fraud in the writ action and this would constitute a triable issue. Counsel for plaintiff had earlier objected to defendant counsel's reference to the documents in the writ action as no affidavit had been filed enclosing the documents.

In my view even if the court were to take judicial notice of the writ action and the claim thereunder (which had in fact been alluded to in the plaintiff's affidavit in support), the existence of such a claim does not constitute a triable issue for the purpose of this application. Nor does the issue of fraud purportedly raised by the defendant in that writ action. Those issues may be relevant for the writ action but not for an application under O. 89 of the RHC, where the issues to be considered are whether the plaintiff is the registered proprietor of the said premises (to which the defendant has already conceded) and whether the defendant is a trespasser which in this case has been clearly established. Hence, I find that there are no triable issues in this case and summary judgment under this order ought to be granted to the plaintiff.